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March 10, 2008

Honorable Frank Maas
Room 740
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: Chatie Graham v. J.B. Hunt Transport, et. al.
07-CV-11446 (FM)
Our Ref: NJBH 16388

Dear Judge Maas:

We are the attorneys for defendants J.B. Hunt Transport and James B. Tabor, and we are writing to ask that this court direct plaintiffs counsel to supply defendants with a HIPPA-compliant authorization for her primary care provider at the time of the accident and all medical records related to her prior medical condition.

This matter, seeking damages for personal injuries, arose out of a collision between the defendants' tractor-trailer and plaintiff's motor vehicle that occurred on or about August 25, 2006 on eastbound I-84 New York. According to plaintiff's ISO claim search report, annexed hereto as **Exhibit A**, plaintiff suffered multiple injuries on or about August 8, 2005 only one year before the accident. By telephone conversation in early February 2008, our office spoke with plaintiff's counsel, requesting the primary care physician's authorization. Despite the good faith efforts of both parties to resolve this, plaintiff refused to supply said authorization, and we refused to withdraw our demand. Therefore, we apply to this Court for relief.

As this Court well knows, the scope of the physician patient privilege is dictated by New York law in this case. *See* FRE 501. The New York State Court of Appeals has held that:

A litigant will be deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue. As we stated in *Koump*, this rule is necessary because ... a party should not be

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permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim.

Dillenbeck v. Hess, 73 N.Y.2d 278, 287, 536 N.E.2d 1126, 1132, 539 N.Y.S.2d 707, 713 (1989). Likewise, the Appellate Division, First Department, has held that "it is recognized that it is unfair for the opposing party in a litigated controversy to have the patient use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not." *Farrow v. Allen*, 194 A.D.2d 40, 45, 608 N.Y.S.2d 1, 4 (1st Dep't 1993).

When a party affirmatively places his or her physical condition at issue, the physician-patient privilege is waived: "once the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition." *Farrow v. Allen*, *id.* at 46, 608 N.Y.S.2d at 4; *see Daniele v. Long Island Jewish-Hillside Med. Cntr.*, 74 A.D.2d 814, 425 N.Y.S.2d 363 (2nd Dep't 1980)("Plaintiff's claim that the injuries sustained included insomnia, irritability, fatigue and weight loss, ... entitled the defendants to full disclosure regarding any psychiatric or psychological treatment she may have received prior to or subsequent to the date of the alleged malpractice"), *Velez v. Daar*, 41 A.D.3d 164, 838 N.Y.S.2d 44 (1st Dep't 2007)("Where records of a sensitive and confidential nature relate to the injury sued upon, disclosure is warranted. The interests of justice in a fair disposition of this dispute outweigh the need for confidentiality").

Indeed, Rule 35 of the Federal Rules of Civil Procedure parallel New York's liberal discovery scheme with respect to waiver of the physician patient privilege. Specifically, "when the mental or physical condition...of a party...is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner...". Rule 35 FRCP.

Here, plaintiff is making a claim for serious personal injuries resulting from a collision with a tractor-trailer. Her injuries included surgical intervention to her left shoulder as a result of trauma. Her prior injury, which occurred one year before the accident at issue, involved multiple injuries listed as "equally serious." *See* annexed ISO report, **Exhibit A**. Since plaintiff has affirmatively placed her physical condition at issue by claiming personal injuries in this case, it is respectfully submitted that she has waived the physician patient privilege, and that she be directed to supply a HIPPA compliant authorization for her primary care physician and for all medical providers that treated her as a result of her August 8, 2005 accident.

Thank you.

Respectfully,

NEWMAN FITCH ALTHEIM MYERS

DPT:jd/rks
Enclosure

David P. Turchi

NEWMAN FITCH ALTHEIM MYERS, P.C.

cc: **Via Fax (212-962-5050) and Regular Mail**
MARK E. SEITELMAN LAW OFFICES, P.C.
Attorneys for the Plaintiff
111 Broadway, 9th Floor
New York, New York 10006
(212) 962-2626

VIA ECF
United States District Court
Southern District

NEWMAN FITCH ALTHEIM MYERS, P.C.

Bcc: J.B. Hunt Transport, Inc.

ISO ClaimSearch Match Report

Date 12-11-2007

A Claim report identified by ClaimSearch identification number 8Q002279291 was received by ISO ClaimSearch on 12/11/2007. Submission of this claim report initiated a claim search. In our database, the claims listed below appear to be similar to the claim submitted. Reasonable procedures have been adopted to maximize the accuracy of this report. Independent investigations should be performed to evaluate the relevant data provided.

Claimant/Insured: GRAHAM, CHATIE,
Address: 22 EDGEWOOD TERRACE
City: NEWBURGH **St:** NY **Zip:** 12550
SSN: 064585575 (SSN ISSUED NY/1976-1977)
Claim Number: A0605807
Date of Loss: 08/25/2006 **Claim Type:** CASU **Loss Type:** BIAR

ClaimSearch ID	Date of Loss	Claim Type	Loss Type	Reason for Match
8I001862330	08/08/2005	CASU	COMP	Individual search
5J002035161	08/25/2006	OTHR	GLLI	Individual search
2R001506870	12/24/2002	CASU	BIAR	Address search

If you have any questions concerning your report, please contact Customer Support at (800)888-4476
 MARK J WHITEHEAD-CAS CLMS MGR
 SAFETY/LIAB CLMS DIV
 J B HUNT TRANSPORT INC
 615 J B HUNT CORPORATE DR
 PO BOX 598
 LOWELL, AR 727450000
 J18200001

Initiating Claim:

Activity & Date: Property/Casualty 08/25/2006 **File Number:** 8Q002279291
Type of Loss: Personal Automobile - Liability **Bodily Injury Auto Related**
Location of Loss: I-84 EXIT 8
City: NEWBURGH **State:** NY **Zip:**
ISO Received: 12/11/2007
Company: J B HUNT TRANSPORT INC **Phone:**
Contact: BADER, JOAN,
Address: 615 J B HUNT CORPORATE DR
 : PO BOX 598
City: LOWELL **State:** AR **Zip:** 72745
Claim Number: A0605807
Policy Number: A0605807

Involved Party: Claimant

Name: GRAHAM, CHATIE,
Address: 22 EDGEWOOD TERRACE

City: NEWBURGH State: NY Zip: 12550
DOB: 09/02/1964
SSN: 064585575 (SSN ISSUED NY/1976-1977)
Phone: 8455610293
Occupation: COMPUTER TECHICIAN
Injury/Damage: SHOULDER/CERVICAL

Service Provider: Lawyer For Claimant
Name: MARK SEITELMAN ESQ
Address: 111 BROADWAY, 9TH FL
City: NEW YORK State: NY Zip: 10006
Phone: 2129622626

Service Provider: Medical Doctor(M.D.)
Name: MIDDLETOWN PHY MED & REHAB
Address: 54 DOLSON AVE # 300
City: MIDDLETOWN State: NY Zip: 10940
Phone: 8453430292

Involved Party: Insured
Name: JB HUNT TRANSPORT INC
Address: PO BOX 130
City: LOWELL State: AR Zip: 72745

Reason for Match

: Individual search Match #: 1
Activity & Date: Property/Casualty 08/08/2005 File Number: 8I001862330
Type of Loss: Workers Compensation Comprehensive
Location of Loss: 1 LAGUARDIA RD
City: CHESTER State: NY Zip:
ISO Received: 08/16/2005
Company: AMERICAN INTERNATIONAL GROUP Phone: 8002422977
Address: AIG WRKRS COMP CS
: 15 CORNELL RD 2ND FLR *
City: LATHAM State: NY Zip: 12110
Claim Number: 709190676001

Involved Party: Claimant
Name: GRAHAM, CHATIE,
Address: 22 EDGEWOOD TERR
City: NEWBURGH State: NY Zip: 12550
DOB: 09/02/1964
SSN: 064585575 (SSN ISSUED NY/1976-1977)

*** 1 more matches on this SSN inside this report ***

*** More matches on this SSN outside this report ***

Occupation: CLIENT CARE WORKER
Injury/Damage: MULTIPLE INJURIES EQUALLY SERIOUS

Involved Party: Insured
Name: VOLUNTEERS OF AMERICA - GREATER
Address: NO FIXED ADDRESS

Reason for Match

: Individual search Match #: 2
Activity & Date: Property/Casualty 08/25/2006 File Number: 5J002035161

Type of Loss: Personal Automobile

City: NEWBURGH

State: NY

Zip:

ISO Received: 08/26/2006

Company: ALLSTATE INSURANCE COMPANY

Phone: 8003669775

Contact: TAYLOR, ANGELICA, R

Phone: 8664375642

Address: BEACON (4730)

: 300 WESTAGE BUSINESS CTR

City: FISHKILL

State: NY

Zip: 12524

Claim Number: 4735625453

Policy Number: 913385571

Involved Party: Both Claimant & Insured

Name: GRAHAM, CHATIE

Address: 22 EDGEWOOD TERRACE

City: NEWBURGH

State: NY

Zip: 125502650

DOB: 09/02/1964

SSN: 064585575

(SSN ISSUED NY/1976-1977)

*** 1 more matches on this SSN inside this report ***

*** More matches on this SSN outside this report ***

Injury/Damage: ARM, LEFT PAIN

Coverage Type: Bodily Injury

Loss Type: Bodily Injury

Contact: TAYLOR, ANGELICA, R

Phone: 8664375642

Reason for Match

: Address search

Match #: 3

Activity & Date: Property/Casualty 12/24/2002

File Number: 2R001506870

Type of Loss: Personal Automobile - Liability Bodily Injury Auto Related

Location of Loss: RT 84, EXIT 10

City: NEWBURGH

State: NY

Zip:

ISO Received: 07/17/2003

Company: NORTHLAND INSURANCE COMPANY

Phone: 6126884100

Address: PO BOX 64816

City: SAINT PAUL

State: MN

Zip: 55164

Claim Number: 21TN346622000001

Policy Number: 21TN346622

Involved Party: Claimant

Name: GRAHAM, KENNETH,

Address: 22 EDGEWOOD TERRACE

City: NEWBURGH

State: NY

Zip: 12550

DOB: 10/12/1965

SSN: 077682379

(SSN ISSUED NY/1984-1985)

Injury/Damage: BACK PAIN, RIGHT KNEE PAIN

Service Provider: Lawyer For Claimant

Name: MARK SEITELMAN

Address: 111 BROADWAY, 9TH FLOOR

City: NEW YORK

State: NY

Zip: 10006

Involved Party: Insured

Name: SUPERIOR TRUCKING INC

Address: 5225 ROUTE 9W

City: NEWBURGH

State: NY

Zip: 12550